No. 2914

In the United States Circuit Court of Appeals

for the Ninth Circuit

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error.

vs.

J. R. BARNABY,
Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief of Plaintiff In Error

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Met. Press

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was instituted February 9, 1916, by the defendant in error to recover for alleged services as a ship's broker, between the 29th day of October, 1910, and the 6th day of June, 1912, in the State of Washington, and in the Province of British Columbia, Canada, alleged to have been rendered to defendant at its instance and request, in writing. The reasonable value of said services is alleged to be the sum of Five Thousand ($5000.00) Dollars.

In the second paragraph of the complaint it was alleged that the defendant was a corporation, organized and existing under the laws of the Republic of France, and for more than three years last past had maintained and was maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said State; and had maintained and was then maintaining a line of vessels, plying with reasonable regularity in the carrying trade between the ports of the state of Washington and foreign ports, importing and exporting general cargoes. This allegation of the complaint was admitted by the answer. (Record p. 1).

The answer of the defendant, a corporation, under the laws of France, denied the allegations as to the services, except that it was admitted that the plaintiff, at the request of defendant, performed certain services in regard to ship's business at about the times mentioned in plaintiff's complaint.

For a first affirmative defense it was set up in the answer that on October 22nd, 1914, plaintiff herein began a cause in the Superior Court of King County, Washington, for the same cause of action, for the same services and upon the same contract pleaded and relied upon by the plaintiff in this cause, and covering the same transactions, and it was further alleged that defendant appeared and joined issue in the cause in the Superior Court and that judgment was entered therein in favor of the plaintiff and against defendant in the sum of $1081.00 on May 18th, 1915, and plaintiff's costs, and that said judgment was thereafter fully paid and satisfied by the defendant. For a second affirmative defense, defendant set up the statute of limitations of the State of Washington, namely, that the action had not been begun or commenced within three years after the rendition of the services sued for. (Record p. 3 and 4.)

The plaintiff by reply denied all the affirmative allegations of the answer. (Record p. 5.)

There was a written stipulation waiving trial by jury. (Record p. 6).

Upon the calling of the case for trial, on July 14th, 1916, counsel for plaintiff moved to amend the complaint in the 4th paragraph by erasing the words "ship's broker" and inserting in lieu thereof "ship's agent." Upon objection made by counsel for defendant, it was stipulated by counsel for plaintiff, in open court, that the services sued for in the case in the Superior Court, referred to and set up in defendant's answer, were rendered as a "ship's agent," and that for the purposes of defendant's plea of former recovery, the term "ship's broker" used in the complaint in the Superior Court, and the term "ship's agent," in this cause after amendment should be held to mean the same thing and should not prejudice defendant's plea of former recovery, and that such pleading of former recovery or *res judicata* should have the same effect as though there had been no amendment, and thereupon the amendment was allowed. (Record p. 23).

Counsel for plaintiff thereupon made an opening

statement to the Court, embodying among other things, the statement that plaintiff relied upon certain letters as evidencing the contract of employment, but containing no direct promise of compensation for the services, and mentioning no sum agreed to be paid plaintiff; and that parol evidence would be offered of the reasonable value of the services alleged to have been rendered by plaintiff.

Counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action is barred by the statute of limitations of the State of Washington, and that it is apparent on the face of the complaint.

After argument the Court declined to rule, reserving the question for consideration on the final argument; and it was thereupon agreed between counsel in open court that all of plaintiff's evidence should go in, subject to this objection, and that defendant should not waive it by offering testimony in its own behalf. (Record p. 23 and 24).

Evidence was introduced by the testimony of plaintiff as to the character and extent of the alleged services; a number of written exhibits were introduced, and parol evidence was offered, both by the plaintiff's testimony and that of other witnesses of the value of the services. Defendant offered testimony of the value of the services. Counsel for plaintiff insisted upon his right to judgment under all the evidence, and counsel for defendant insisted that his objection to the admission of any evidence in support of the complaint must be sustained; and that in any event, defendant was entitled to a judgment of dismissal, under all the evidence. After argument the court took the case under advisement, written briefs to be furnished by counsel on both sides. Thereafter the Court filed a memorandum decision or opinion for the plaintiff in the sum of Four Thousand ($4000.00) Dollars. (Record p. 7 to 14).

A general finding was made for the plaintiff, to which defendant excepted, and judgment was entered thereon. (Record p. 14, 15 and 16).

A petition for new trial was filed according to rule, and it was denied, and exception saved. (Record p. 16 to 20).

This Writ of Error was thereupon sued out.

SPECIFICATIONS OF ERROR.

First: The judgment was erroneous because it adjudges that the said plaintiff shall recover the sum of five thousand thirty-three dollars and thirty-three cents ($5,033.33) against the said defendant.

Second. Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third. Because the evidence was insufficient to support or justify the finding and judgment rendered in said cause on the 2nd day of October, 1916.

Fourth. Because the court erred in overruling the objection of the defendant to the reception or introduction of any evidence to support plaintiff's complaint.

Fifth. Because the evidence upon the trial of said cause shows that the plaintiff's cause of action was barred at the time of the commencement of this action by the statute of limitations of the State of Washington..

Sixth. Because the undisputed evidence in the case shows that the cause of action set up in plaintiff's complaint herein was merged in and barred by the judgment entered in the Superior Court of King County, Washington, in cause No. 104,397, of the files of said Court as shown by defendant's exhibit "A" introduced herein.

Seventh. Because the undisputed evidence in the case shows that the plaintiff recovered, or ought to, or should have recovered, and would in law recover all of his claims and demands against this defendant for which he has herein sued, in that certain action in the Superior Court of King County, Washington, wherein the plaintiff herein is plaintiff and the defendant herein is defendant, being No. 104,397 of the files of said Superior Court, as shown by defendant's exhibit "A" introduced in evidence herein on the trial.

Eighth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: GORDON STEWART CURRIE. Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe? MR. KIEFER. I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars.

Ninth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: Q. State what is the relative value of like services in England and British Columbia and in Seattle —for services of this character. MR. KIEFER. I object to that as irrelevant and immaterial. THE COURT. Objection overruled. MR. KIEFER. Exception. THE COURT. Allowed. Q. Would they be higher or lower or practically the same? A. Much higher. I should say in the ratio of two and a half to one.

Tenth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: J. R. BARNABY. Shown bill, Plaintiff's Exhibit "21," and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision. MR. KIEFER. Object to that as irrelevant. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed.

Eleventh. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff: Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency. MR. KIEFER: I object to that as incompetent, irrelevant and immaterial. THE COURT: Same ruling. MR. KIEFER: Exception. THE COURT: Allowed. A. Most certainly not.

Twelfth. That the court erred in overruling the objec-

tion of the defendant to the following question propounded to the plaintiff. Q. Did you or did you not testify in that case relative to the receiving or not receiving instructions to render General Average Agency service? A. I would like to have that question again. (Question read). MR. KIEFER. I object to that on the same grounds. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. I received instructions. Q. I am asking you if you testified. A. I testified.

Thirteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff: Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services? MR. KIEFER. We object to that as incompetent. You cannot contradict the record in the case. THE COURT. That is one of the questions I will hear you on finally. Objection overruled. MR. KIEFER. Exception. MR. GORHAM. We offer that in evidence. And the bill is offered, and admitted as plaintiff's exhibits "22" and "23." (Last question read). A. I did, and it is detailed in that bill for General Average Agency service, and that alone. I first forwarded the bill for General Average Agency, a copy of which is here introduced as plaintiff's exhibit "22," to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Fourteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. From whom had you expected to receive a check in payment of the bill? MR. KIEFER. Same objection. (As immaterial). THE COURT. Overruled. MR. KIEFER. Exception. A. From the insurance underwriters in San Francisco, through the average adjusters in the usual way.

Fifteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Were the acts whereby you discharged your function as General Average Agent the

same acts whereby you discharged your function as ship's agent in the matters you testified to this morning? MR. KIEFER. Objected to as incompetent and immaterial. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. The acts were entirely different. The general average agency services referred to facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such writ of garnishment issued and served.

Sixteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Do you remember your counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant? MR. KIEFER. Objected to. THE COURT. Overruled. MR. KIEFER. Exception. A. I was guided entirely by my counsel. I followed his advice implicitly.

Seventeenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made? MR. KIEFER. Same objection to that. That clearly is improper. THE COURT. Overruled. MR. KIEFER: Exception. THE COURT. Allowed. A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Eighteenth. That the court erred in overruling the objection of the defendant to the testimony given by the witness Gorham on behalf of the plaintiff. MR. KIEFER. I want to object to all that, if the court please, as irrele-

vant and immaterial, and as incompetent to contradict this record. THE COURT. Overruled. Exception. Allowed. THE WITNESS. A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby after closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Balfour, Guthrie & Company, if he was satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that

it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this State, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

ARGUMENT.

We will first consider our Fourth Assignment of Error, which is predicated upon the refusal of the trial court to sustain the objection of the plaintiff in error to the admission of any evidence to support the complaint.

The allegation of the complaint is that the services sued for were rendered between October 29th, 1910, and June 6th, 1912, and that they were rendered upon the request of the plaintiff in error, in writing. There is a further allegation of the reasonable value of the services. (Record p. 1.)

When the case was called for trial, counsel for defendant in error made an opening statement to the effect that the plaintiff relied upon certain letters of the defendant as evidencing the contract of employment, but containing no direct promise of compensation for the services, and mentioning no sum agreed to be paid plaintiff, and that evidence would be offered of the reasonable value of the services alleged to have been rendered by defendant in error. Thereupon counsel for plaintiff in error objected to the admission of any evidence in support of plaintiff's complaint for the reason that it appears from the record as it then stood and from the complaint itself that the action was barred by the statute of limitations of the State of Washington. The trial court after argument declined to rule upon the objection, reserving the question until the close of the case. It was thereupon agreed that all of plaintiff's evidence should be subject to this objection, and that defendant should not waive its objection by offering evidence in its own behalf. (Record, p. 23 and 24.)

The trial court never distinctly passed upon this ques-

tion, but in his memorandum of opinion (Record pp. 7 to 10) treats the objection as a demurrer to the evidence after its reception. We submit that the Court therein erred. This objection must be considered strictly in the light of the complaint and the opening statement of counsel. The statute of the State of Washington affecting this question reads as follows:

> Within three years "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."
>
> Rem. & Bal. Code, Sec. 159.

It should be borne in mind that the last service was rendered June 6th, 1912, and the action was begun February 9th, 1916, so that clearly three years had run at the time when the action was begun.

The defendant in error is clearly bound by the allegation in his complaint that the plaintiff in error, during more than three years prior to the bringing of his action was maintaining an office and agency and had a general agency within the territorial jurisdiction of this court. This clearly appears from the case of

> *Northern Pacific Ry. Co. vs. Paine,* 119 U. S. 561; 30 Law Ed. 513.

We submit that the statute which we have quoted above is applicable to the case at bar. It is true that the complaint alleged that the services were rendered at the written request of the plaintiff in error, but coupled therewith is the allegation of reasonable value of the services.

In the case of *Ingalls vs. Angell,* 76 Wash. 692, the Supreme Court of the State of Washington construed this statute, and as we view it settled this question. That was an action to recover for the value of nursery stock which had been delivered upon a written order mentioning no price to be paid for the trees. Oral testimony was resorted to to show their reasonable value; and the Supreme Court of the State of Washington, says:

> "The written order upon which an attempt was made to state a cause of action did not contain anything as

to the price of the trees. This was an essential element of the contract. It would appear then, that one of the necessary terms not being set out in the writing, in order to establish the price, resort must be made to oral testimony. The contract would be in part oral and in part written. The rule is that a contract partly in writing and partly oral is an oral contract."

Bishop on Contracts, Sec 164.

Commissioners of Marion County vs. Shipley, 77 Ind. 553.

The State of Washington has the usual statutory provision that the period of absence of a defendant from the state should not be included in the computation of time necessary to the running of the statute. It is clear, however, that the fact is that the plaintiff in error for more than three years prior to the institution of this action, and after the accrual of the cause of action, maintained an agency within the territorial jurisdiction of this court, and had at said times an agent upon whom process could be served, the statute of limitations therefore ran in favor of the plaintiff in error during all of this time.

Southern Railway Co. vs. Mayes, 113 Fed. 84;
Crowder vs. Morphy, 61 Wash. 626;
Ilse vs. Aetna Indemnity Co., 69 Wash. 484;
Turcott vs. Yazoo, etc., Ry. Co., 40 L. R. A. 768;
U. S. Express Co. vs. Ware, 87 U. S. 543, Book 22 L. Ed. 422.

The defendant in error having alleged in his complaint the doing of business in the state, and the maintenance of an office and an agency therein for more than three years after the accrual of the cause of action, and prior to the beginning of this action, is estopped to claim that the plaintiff in error may not plead the statute.

Harrington vs. Gordon, 42 Wash. 692;
Lumley vs. Wabash Ry. Co., 71 Fed. 21.

The defendant in error at the trial made the contention that the statute applicable to this case is the six years and not the three years statute. The portion of the six years

statute of limitations of the State of Washington which must be invoked to aid the defendant in error is Sub-Division 2 of Sec. 157, Rem. & Bal. Code, and reads as follows:

> 2. "An action upon a contract in writing, or liability, expressed or implied, arising out of a written agreement;"

We submit that the construction of the statute by the Supreme Court of the State of Washington appearing in the case of *Ingalls vs. Angell, supra,* is controlling and should be followed by this Court.

In *Railway Passengers Association vs. Loomis,* 32 N. E. 424, it is held that if parol evidence is required to help out a written contract and supply missing terms, the entire contract is oral.

In the case of *Grafton vs. Cummings,* 99 U. S. 100, Book 25, L. Ed. 366, it is held that if a written contract failed to contain all the terms to make it a valid and enforcible contract, and resort be had to parol evidence to supply such lack, the entire contract is thereby made oral.

The opinion of the trial court shows that in ruling upon this question the court was influenced not by the pleadings as amplified by the opening statement of counsel for the defendant in error at the time the objection was made, but considered what he conceived to be the evidence. (Record p. 10).

The allegation of agency for more than three years being admitted in the answer, the defendant in error was absolutely bound thereby as we have shown in the cases cited.

Passing to the evidence, however, we submit that there is absolutely no evidence to sustain the view of the trial court upon this question.

When Captain Jolivet, the local agent of plaintiff in error, was on the stand as a witness for a particular and specific purpose, namely, to testify as an expert as to the value of alleged services of defendant in error, he was cross-examined by Mr. Gorham, solely with a view to show his interest in the controversy; and he then testified that

he had acted as the agent of the plaintiff in error for three years. (Record p. 55). This was not followed up to show that it was exactly three or more than three years. He was testifying in the month of July, 1916. For aught that appears he might have been the agent of the plaintiff in error for three years and ten or eleven months. It is admitted that Captain Jolivet succeeded the defendant in error. The defendant in error stated that he did nothing after April, 1912; that he was not thereafter the agent of the plaintiff in error (Record p. 56).

There was no issue upon the question of the plaintiff in error being duly represented by an agent in the City of Seattle, for a period more than sufficient to bar the cause of action of the defendant in error, if the three years statute applies. There being no issue upon this question, and the testimony having been elicited for a specific purpose, namely, to affect the credibility of the witness, Jolivet, by showing his interest, the trial court was clearly in error in disposing of our objection to the introduction of testimony in the manner in which he did. This objection should have been disposed of in the light of the record as it stood at the time the objection was made. The defendant in error having made in his complaint the allegation that he did, with regard to agency, and having served plaintiff in error through its agent, we submit that he is absolutely bound by his allegation and procedure. There is nothing in the record, therefore, to sustain the trial court's view that during a portion of the three years prior to the beginning of this action, the defendant in error was still the agent of the plaintiff in error and for that reason could not bring his action. He, himself, ceased to be agent in April, 1912 (Record p. 56). His successor was Captain Jolivet, as is admitted. He has alleged in his complaint that for more than three years prior to the beginning of this action, the plaintiff in error maintained an office and agent in Seattle.

Under the statutes of the State of Washington, mere service of the summons and complaint would not toll the running of the statute of limitations.

Sec. 167, Rem. & Bal. Code, provides:

"The limitations prescribed in this act (Chapter) shall

apply to actions . . . an action shall be deemed commenced when the complaint is filed."

Blalock vs. Condon, 51 Wash. 604;
Service vs. McMahon, 42 Wash. 452.

But it clearly appears from the record as we have shown, that the defendant in error could at all times for more than three years prior to the commencement of this action, have obtained service upon the plaintiff in error, precisely as he has done it in this action, and therefore the objection of the plaintiff in error to the introduction of testimony to support the complaint should have been sustained.

Defendant in error made no offer or motion and took no order permitting any amendment of the pleadings. This objection of the plaintiff in error to the reception of evidence must therefore be considered upon the pleadings and upon the opening statement of counsel made to the court. The objection made by counsel for the plaintiff in error is in accordance with the practice in the courts of the State of Washington.

Belknap Glass Co vs. Kelleher et al., 72 Wash. 529;
Gladden vs. Jacobowski, 61 Wash. 242.

By our fifth assignment of error we claim that the judgment in this case is erroneous and unjust because the evidence upon the trial of said cause shows that plaintiff's cause of action was barred at the time of the commencement of this action by the statute of limitations of the State of Washington.

The defendant in error testified (Record p 56), that he rendered no service after April, 1912, although in his complaint he does allege that his services were completed June 6th, 1912. The case was begun February 9th, 1916. The cause of action accrued at the close of the rendition of the services.

Blake vs. Pratt, 54 Pac. 806;
Robinson vs. McAfee's Estate, 26 N. W. 643;
City of Seattle vs. Walker, 87 Wash. 609.

The trial court appeared to think that the agency of the defendant in error continued up to July, 1913. We

have shown in our argument upon the preceding point that this is incorrect; neither can that portion of the practice act of 1893, quoted by the trial court in his opinion at page 9 of the record, requiring service to be made within ninety days from filing the complaint, have any application. The fact of the service of process would not toll the running of the statute of limitations. As we have shown by our statute and the cases cited in the Supreme Court of the State of Washington, even if service is made, the statute continues to run until the complaint is filed. Even if it did appear that the defendant in error continued to be the agent of the plaintiff in error after April or June, 1912 (as it clearly does not), that fact would not prevent him from bringing suit. He could have assigned his claim to some third party and service could have been made and the complaint filed.

In the case of *Schubach vs. Redelsheimer's Executors,* 158 Pac. 739, an executor having a claim against the estate which had been rejected by his co-executor, assigned the same to a third party, who brought action against both executors. Judgment was entered in the lower court in favor of defendant upon a demurrer to the complaint. This judgment was reversed. The Supreme Court of the State of Washington, thereby at least impliedly approves such practice.

The legislature has provided certain exceptions in the statute of limitations. The courts cannot add thereto and thereby graft upon the statute exceptions not made by the legislature. Upon this point we also cite the cases cited in our preceding point.

The Cause of Action of Defendant In Error Merged In and Barred by His Former Recovery.

The plaintiff in error offered in evidence, the complaint, answer, reply, findings of fact, conclusions of law, and judgment entered by the Superior Court of King County, Washington, in Cause No. 104397, wherein the parties were the same as in this cause, as defendant's exhibit "A." In connection therewith it was admitted that the judgment was paid and fully satisfied. The complaint in that cause alleges that between November 12th, 1909, and January 5th, 1914, at Seattle, Washington, and Vancouver, B. C., plaint-

iff rendered services as a "ship's broker," to the defendant at its special instance and request.

The defendant appeared and answered in the Superior Court and after trial the court made findings following the complaint and entered judgment for Ten Hundred and eighty-one ($1081.00) Dollars and costs. This judgment was thereafter paid.

In the case at bar the allegations of the complaint originally stood that between the 29th day of October, 1910, and the 6th day of June, 1912, in the State of Washington, and the Province of British Columbia, plaintiff rendered services as a "ship's broker" to the defendant.

Upon the trial the complaint was amended by erasing the words "ship's broker," and inserting in lieu thereof the words "ship's agent." It was stipulated between counsel that this amendment should not prejudice the defendant's plea of former recovery (Record p. 23). And before defendant rested it was again stipulated that the amendment of the complaint in the case should not alter the force and effect the judgment of the Superior Court as a bar, if it be otherwise a bar, and that the term "ship's broker" should be considered by the Court to mean the same as "ship's agent" (Record p. 56). It is settled law that if a plaintiff bring an action for a portion of his claim, the recovery of judgment for such portion bars an action for the remainder of his claim.

The difficulty is not as to what the law is upon this subject, but in its application. The courts appear to be agreed upon the proposition that a man may not split his demand; the difficulty arises in distinguishing between a single cause of action and separate or several causes of action.

We submit that the trial court appears in his opinion to have overlooked the stipulation of counsel with regard to the amendment, the court says (Record p. 13):

> "There being no evidence as to whether the services for which plaintiff now seeks to recover were those of a broker, rather than a ship's agent, the precise point is not then in issue as to whether such services were those of a ship's broker or not. The term 'ship's agent' is

broader than 'ship's broker.' The latter might be included in the former, but not the former in the latter. The services for which claim is now made being those of an agent, and there being no evidence that they are those of a broker, the burden of establishing such fact, resting upon the defendant, has not been upheld."

The stipulation that the term "ship's agent" and "ship's broker" should be held to be synonymous and to mean the same thing undoubtedly cut off all the evidence offered by the defendant in error and admitted over the objection and exception of the plaintiff in error, as to what was testified to at the trial of the Superior Court.

It would be just as reasonable to admit parol evidence to show in a suit on a promissory note of the same amount and date as one already in judgment, that the first action was in fact upon a different note for a different amount.

If the demand of the defendant in error be considered as a running account between the defendant in error and the plaintiff in error, then clearly the court erred.

It will be observed that the period set up in the Superior Court action embraces all of the period set up in the suit at bar, and the first action is for exactly the same kind of services as the services sued for in the case at bar.

We submit that this case is controlled by

Baird vs. U. S., 96 U. S. 430 L. Ed., Book 24, p 703.

In that case a firm of locomotive builders brought suit in the court of claims against the United States for extras alleged to be due under a contract for the construction of locomotives for the Government during the Civil War. Recovery was had. Subsequently another action was brought against the government to recover different extras not included in the first action, and it was held that the recovery in the first was a bar to the maintenance of the second action.

An attorney was employed by a Mortgage Loan Company to examine abstracts, and upon such examination to

make certificates of title to each abstract, and to render other services. He received an annual retainer for certain services, and rendered bills from time to time for the examination of abstracts; his charges for abstract examination being based upon the amount of the loan. He brought an action to recover a certain sum, and judgment was entered in his favor. He then brought a second action for other and different services which had been rendered before the commencement of the first action, but not sued for therein. The Mortgage Company pleaded the judgment in the first case as a bar to the second, and the answer was sustained upon demurrer in an opinion by Judge Deady. According to the printed report at the end of the opinion the demurrer was sustained; but it is apparent from a reading of the opinion, as well as the report of the succeeding case, that the demurrer was overruled, and that this is merely a misprint.

Hughes vs. Mortgage Co. 26 Fed. 837.

To the same effect is the case of

Lucas vs. LeCompte, 42 Ill. 303.

The services alleged to have been rendered by the defendant in error here closely approximate the services of an attorney-at-law.

A debtor in a large book account gave several notes maturing at different times, covering most of the account, although leaving a small balance. Two of these notes had matured and thereupon suit was brought upon the entire account according to the claim filed, but alleging a balance equal to the two overdue notes, and the small balance not covered by the notes. There was also an indorsement on the plaintiff's declaration to the effect that the amount sued for was the two notes, and the small balance of account. Judgment was taken for the amount of the notes and small balance. In a subsequent action it was held that the first suit barred an action for the balance of the account.

Buck vs. Wilson, 6 Atl. 97.

An action was brought for damages for infringement of patent, and resulted in judgment. Subsequently a bill in

equity was filed for an accounting for other sales not embraced in the first suit, but made prior to the bringing of the first action. Held that the judgment in the first action barred the bill in equity.

Panoulioas vs. National Equipment Co. 198 Fed. 493.

A judgment in an action upon a running account is a bar to another action for a part of the account, although the second action be for items not included in the first action, but due when the first action was commenced.

Borngesser vs. Harrison, 78 Amer. Dec. 757.

A contract was made for the purchase of a large quantity of lumber at a fixed price, deliveries to be made from time to time. Vendor brought separate actions for separate and several deliveries. Held that this could not be done.

McPhail vs. Johnson, 13 S. E. 799.

Defendant occupied plaintiff's premises for a period in excess of two years agreeing to pay $37.50 per month. October 31st, 1877, suit was brought to recover for two years ending September 30th, 1877. November 1st, 1877, suit was brought before a Justice of the Peace for $37.50, for rent for the month of October, 1877. Judgment was obtained in the Justice of the Peace case and was paid. Upon the subsequent trial of the case first brought, it was held that the judgment in the Justice Court was a bar to the recovery of the two years rent, as the plaintiff was bound to include in one action everything that was due.

Burritt vs. Belfy, (Conn.) 36 Amer. Rep. 79.

See also

Memurer vs. Casey, 15 N. W. 877, 23 Cyc. 440.

This court should follow the settled law of the State of Washington, and we submit that it is abundantly settled by the decisions of the Supreme Court of Washington, that the defendant in error cannot maintain this action, as he is barred by his previous action.

Holt Mfg. Co. vs. Coss, 78 Wash. 39.
Gladden vs. Jacobowski, 61 Wash. 242.

Perlus vs. Silver, 71 Wash. 338.
Farwell vs. Brisson, 66 Wash. 305.
International Development Co. vs. Clemans, 66 Wash. 620.
Thompson vs. Washington National Bank, 68 Wash. 42.
Gladwin vs. Chaney, 67 Wash. 151.
Collins vs. Gleason, 47 Wash. 69.
Kline vs. Stein, 46 Wash. 546.
Carmean vs. N. A. T. & T. Co. 45 Wash. 446.
Sweeney vs. Waterhouse & Co. 43 Wash. 613.

The case of *Stern vs. Washington National Bank,* 14 Wash. 511, is particularly in point. That was an action for professional services of an attorney, and it appears from the record that the court withdrew from the consideration of the jury an item for certain services between certain dates. In a subsequent action to recover for the excluded item, it was held that the first action was a bar to the second. We also cite as to this point,

Spokane Valley L. & W. Co. vs. A. B. Jones & Co., 53 Wash. 37.
Schultz vs. Christopher, 65 Wash. 496.
Rosenmueller vs. Lampe, 89 Ill. 212; 31 Amer. Rep. 74.
Hawkins vs. Rebert, 81 Wash. 79.
Krug vs. Hendricks, 54 Wash. 209.

Owners of a patent obtained a decree for a perpetual injunction against an infringement and awarding damages and profits for infringement occurring prior to a given date. A subsequent action was brought to recover damages and profits arising from other acts of infringement committed during the same period, but for which no recovery was asked in the first suit, and no evidence was given on trial. Held that the first action barred the second.

Horton vs. N. Y. Central & H. Ry. Co. 63 Fed. 897.

See also

Claflin & Kimball vs. Mather Elec. Co. 87 Fed 795.
Bucki vs. Atlantic Lbr. Co. 109 Fed. 411.

We submit that the expense account rendered by the defendant in error to the plaintiff in error, and offered in evidence as Exhibit "A," shows plainly that he considered it as one matter. He rendered but one expense account both for the average adjustment matter and the matter of the litigation in British Columbia. He did not segregate his expenses. When the letters and cables from the plaintiff in error to the defendant in error, and vice versa are considered, it will be seen that it was all one employment. The situation of the parties should be borne in mind. Barnaby had been an agent of the Societe from 1907 until 1910, attending to all matters for them; and when the trouble of the Notre Dame d'Arvor arose, the service was an entire one. The attempted division by the defendant in error between the general average matter and the services with regard to the litigation is merely fanciful. The rendering of separate bills cannot help the defendant in error; as well might a merchant having a running account for household necessities, split it up into separate actions, and bring one suit for flour, another for sugar and another for butter, and so on through all the catalogue of groceries. It would clearly be as reasonable for the defendant in error to have sued the plaintiff in error for each trip that he made to Vancouver.

We submit that the services of the defendant in error were all rendered in connection with the troubles of the ship Notre Dame d'Arvor belonging to the plaintiff in error, and that the attempted division into two separate items is fallacious.

In the case of

Morrisey vs. Faucett, 28 Wash. 52

We have a case of services of various kinds, and the Supreme Court of the State of Washington there held that the services were continuous and under a single contract, and that the contract was a continuous one, and the statute of limitations did not begin to run until the completion of the service. The same principle is here applicable. If the contract was an entire one, then the defendant in error is absolutely barred by his recovery in the first action.

We confidently submit that the judgment of the trial

court was erroneous and should be reversed upon this ground alone.

The eighth assignment of error raises the question of the qualifications of the witness, George Stewart Currie, as an expert on the value of the alleged services of the defendant in error. The witness, at page 49 of the record, had testified to his experience in shipping matters, and had shown considerable experience in that line, but none whatever in the line of the preparing such cases for trial. It is to be observed that the defendant in error is suing for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. The witness, Currie, did not show that he had ever had any experience in such matters. Our objection, therefore, was well taken. Another question arises as to the testimony of the same witness at pages 50, 51 and 52 of the record. The witness, Currie, was interrogated as to the value of similar services in England, and was allowed to make a comparison of the value of the services alleged to have been rendered by the defendant in error in this country, and in England. The defendant in error at page 52 of the record, was asked a question going into the same matter as complained of in this assignment of error, and forms the basis of our tenth assignment of error. (Record 67 and 68).

We submit that the trial court invaded the rights of the plaintiff in error in permitting this matter to be gone into. It certainly was utterly immaterial what the plaintiff in error paid its representative in London, England, in the litigation over the Raithwaite collision. The testimony given by the witnesses is highly damaging to the plaintiff in error, and could not fail to influence the trial court as is shown by the extravagant award made to the defendant in error.

We submit that this is error requiring the reversal of the judgment.

Our 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th assignments of error will be considered under the same head; they all cover virtually the same question, namely, the admissibility of the evidence of the defendant in error to the effect that in his first action in the Superior Court

of King County, Washington, he did not sue for the services sued for herein. In the attempt to escape the effect of the allegations of his pleadings, the amendment of complaint at page 23 of record was made. He sued in the first cause for services as "ship's broker" for a period which included the period sued for in the case at bar, for exactly the same services, namely, those of a "ship's broker." It was stipulated at pages 23 and 56 of the record that the term "ship's agent" as used in the complaint in the suit at bar after amendment should be held to mean the same thing; and that the amendment should not prejudice the plaintiff in error's plea of former recovery.

The case at bar is exactly the same as if a plaintiff sued to recover for ten thousand pounds of butter, alleged to have been sold between two dates mentioned in his complaint, and thereafter brought a second suit to recover for five thousand pounds of the same article sold during a portion of the period mentioned in his first complaint. Neither can the case at bar be distinguished from the two cases for Attorney's fees, cited above.

26 Fed. 837.
42 Ill. 303.

It would be just as reasonable to allow a carpenter to sue for each of thirty days wages upon an employment at so much per diem.

An attempt was made in the trial court to distinguish the two cases by reason of the fact that the first action was one in rem. It is true that at the time of beginning the action in the Superior Court, a writ of garnishment was sued out; but garnishment is not a method of beginning an action under the statutes of the State of Washington.

> Sec. 220 Rem. & Bal. Code provides that "Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as Clerk of the Court. * * *"

The provision as to garnishment as found in Sec. 680 is as follows:

> "The clerks of the superior courts in the various counties in the state may issue writs of garnishment

returnable to their respective courts in the following cases:

1. Where an original attachment has been issued in accordance with the statutes in relation to attachments;

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee;

3. Where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have a writ of garnishment issued."

Sec. 681 provides that, if the writ is issued under subdivision 2, a bond must be given.

Sec. 682 provides for an affidavit by the plaintiff, or someone in his behalf, stating certain facts required to support the issuance of the writ, which in substance are that the plaintiff has reason to believe and does believe that the garnishee, stating name and residence, is indebted to the defendant, or has in his possession or under his control, personal property or effects belonging to the defendant, or that garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company, or has an interest therein.

Then follow provisions for the service of the writ, answer and hearing.

We submit that the garnishment contemplated by the statutes of the State of Washington is mesne process, ancillary and auxiliary to the main case; and in no sense a proceeding in rem.

The reasoning of the trial court, in his opinion at page 12 of the record, upon this subject is fallacious and inconclusive and not in accordance with the settled law.

The defendant in error could have brought his action for the entire amount of his claim for services, and if the plaintiff in error had failed to appear in the Superior Court he could have exhausted the funds garnished, and such garnishment would not have barred his remedy for

the balance not realized. The decision of the trial court was evidently tempered by this consideration as appears from the reading of the memorandum decision at pages 11 and 12 of the record. It is settled law that a failure to realize the entire amount sued for from funds attached or garnished, does not bar the plaintiff's remedy for the balance.

Hochstein vs. Hill, 153 N. Y. Sup. 899.
Smith vs. Curtis, 38 Mich. 393.
Stone vs. Myers, 86 Amer. Dec. 104.

It appears from Exhibit "A" of the plaintiff in error and is an undisputed fact that after the commencement of the suit in the Superior Court, the plaintiff in error appeared. It was perfectly competent for defendant in error then, without any risk to himself, to have amended his complaint to embrace his entire account. The fear manifested by the witness, Mr. Gorham, as attorney for defendant in error, that he might prejudice his client's cause by suing for the entire amount, and not reach sufficient funds by garnishment to accomplish a full satisfaction, is without foundation in the law. The law will not permit the splitting up of a cause of action to suit the convenience or necessity of a plaintiff litigant, or a defendant litigant.

It is the duty of the plaintiff to bring forward his entire cause of action, and of the defendant to bring forward all his defenses. It would be just as reasonable to allow a defendant after waging an unsuccessful defense of set off against a cause of action, to bring another action to set aside the first judgment on the ground that he wanted to interpose a plea of payment, which for some season appearing to him sufficient, he did not interpose in the first cause.

The judgment in this case is grossly excessive. The defendant in error was allowed a sum which would surely be an ample counsel fee for representing the plaintiff in error in the litigation in British Columbia. The defendant in error himself says that his business was yielding him between three and four thousand dollars per annum, when he gave it his undivided attention. It appears from his expense account, defendant's Exhibit "B," that the plaintiff

in error was exceedingly liberal with him in the matter of expenses; and the reading of the evidence of the defendant in error cannot fail to impress the court that the defendant in error has throughout the trial greatly magnified his own services during the progress of the business, and used every opportunity to spend time upon the matter in hand and lay the foundation for future excessive charges.

We submit that if the defendant in error is to recover at all, his recovery should be limited to an amount not exceeding Five Hundred ($500.00) Dollars. The services of a "ship's broker" or "agent" are not so valuable as to warrant the allowance of any such sum as was here awarded.

Finally, we submit the following propositions:

(A) The judgment should be reversed and the case dismissed for the reason that the cause of action sued upon was at the time of beginning the action, barred by the statute of limitations of the State of Washington.

(B) The judgment should be reversed and the case dismissed for the reason that the cause of action herein sued upon was merged in and barred by the recovery of judgment by the defendant in error against the plaintiff in error in the cause in the Superior Court of King County, Washington.

(C) That the judgment should be reversed and the cause sent back for a new trial for the errors committed by the court in the admission of evidence.

(D) The recovery of the defendant in error, if he is to recover, should be limited to Five Hundred ($500.00) Dollars.

Respectfully submitted,

James Kiefer,

Attorney for Plaintiff in Error.